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No. 03-932

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DURA PHARMACEUTICALS, INC.; CAM L. GARNER; JAMES W. NEWMAN; CHARLES W. PRETTYMAN; WALTER F. SPATH; JAMES C. BLAIR; JULIA R. BROWN; JOSEPH C. COOK, JR.; and MITCHELL R. WOODBURY,

Petitioners,

v.

MICHAEL BROUDO; BALDEV S. GILL; LARRY MORGAN IRA; LEONID SHVARTSMAN, (for G&S partnership); NEIL SISKIND; ROBERTA SPECK; BRENT VOGT, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *i* of their reply brief, and there are no amendments to that statement.

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Petitioners do not oppose respondents' motion for leave to file a supplemental brief in response to the Solicitor General's Brief for the United States as *Amicus Curiae* so long as this Response is considered also.

1. This case is about the proper standard for pleading loss causation. Whether reversal by the Supreme Court results in a complete dismissal of respondents' Albuterol Spiros claims or the filing of an amended (albeit severely limited) complaint by respondents, there can be no doubt that the determination of the proper standard for loss causation "is fundamental to the further conduct of the case" and therefore meets the standard for review. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari to determine which items of loss would properly be part of damages). As the Solicitor General demonstrated, that standard is easily met here. (SG Brief at 15-18).

If the Court reverses, one of two outcomes will happen. The most likely is that the district court's dismissal will be affirmed. The only other possible outcome is that the respondents will be required to replead to limit their Albuterol Spiros claims to the decline after the November 1998 announcement. This will both eliminate all claims for class members that sold before the November 1998 announcement, and drastically reduce or negate any alleged damages for all remaining class members. (*See* Pet. at 18; Pet. Reply at 8). Thus, the Court's ruling will be "fundamental to the further conduct of the case" on remand whichever course is followed. Accordingly, certiorari should be granted to resolve the important and recurring circuit conflict on loss causation.[1]

1. Supreme Court precedent is replete with examples of cases where the Court has accepted review of and decided issues concerning (Cont'd)

2. Respondents' Supplemental Brief recycles the arguments previously expressed by them in their Response in Opposition to Petition for Writ of Certiorari. Again, respondents fail in their attempt to obfuscate the existence of the acknowledged conflict among the circuits – a viewpoint that is shared by no one else. The conflict was expressly recognized by the Ninth Circuit in its decision below as well as by other courts, by petitioners, and by the Securities Industry Association. It is also now acknowledged in this case by the Solicitor General and the Securities and Exchange Commission. That conflict has been thoroughly briefed by petitioners, the Securities Industry Association as Amicus Curiae, and the United States as Amicus Curiae. Those arguments need not be reiterated here. As each of the briefs submitted by these parties illustrates, and as the Ninth Circuit itself has expressly

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(Cont'd)
the appropriate scope or measure of relief available to a plaintiff, and such review was not impeded where applying the correct legal standard would not result in dismissal of the action in its entirety. *See, e.g., Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (addressed issue of whether asbestosis plaintiff could recover pain and suffering damages for his fear of developing cancer; availability of other relief was not in question); *United States v. Bornstein*, 423 U.S. 303 (1976) (in a False Claims Act case, the issue was how many forfeitures the government was entitled to and how double damages were to be calculated; there was no dispute as to the government's entitlement to the forfeitures and to double damages). Also, as noted in our prior submission, the Court has granted certiorari to resolve important Rule 10b-5 issues in other cases involving circuit court reversals of Rule 12(b)(6) dismissal of complaints. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 469 (1977) (establishing that Rule 10b-5 does not cover mismanagement or breach of fiduciary duty); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975) (establishing that private Rule 10b-5 plaintiff must be a purchaser or seller).

acknowledged, the conflict is real, persistent and well-positioned for resolution by this Court.[2]

3. Notwithstanding respondents' assertion that the Solicitor General has misunderstood and misstated Ninth Circuit law, respondents nonetheless argue that the Solicitor General is, in fact, aligned with their position that a decline in stock price is not necessary to establish loss causation. This interpretation of the Solicitor General's position is not reasonable. The Solicitor General clearly indicates that in order to establish loss causation, there must be an actual reductive effect in the price of the stock – whether in the form of an overall decline in stock price or a decline in price which is masked by an unrelated increase – that results from disclosure of the alleged misrepresentation. As the Solicitor General reasoned,

> it cannot be said that an investor in a fraud-on-the-market case who purchases a security at an inflated price has suffered *any* loss at the time of purchase, much less one caused by the defendant's misrepresentation. . . . Measuring the loss in such a case as of the time of purchase, and not requiring

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2. As the Solicitor General correctly pointed out, in their petition for rehearing en banc, petitioners invited the Ninth Circuit to reconsider its decision, in light of the inter-circuit conflict as well as the intra-circuit conflict. (Pet. App. 52a-53a). The Ninth Circuit denied the petition without comment. As such, the decision here is the law of the Ninth Circuit on loss causation. Indeed, it already has been cited as such by district courts. *See In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 310 F. Supp.2d 819, 836 (S.D. Tex. Mar. 29, 2004); *In re Electronic Data Systems Corp. Securities and "ERISA" Litigation*, 298 F. Supp.2d 544, 560 (E.D. Tex. Jan. 13, 2004).

> any allegation of a *subsequent* loss of value attributable to the fraud, would grant a windfall to investors. . . .

(SG Brief at 11) (emphasis added).

In their attempt to align the Solicitor General's position with their own, respondents rely solely on the Solicitor General's hypothetical example wherein the disclosure of negative and positive information results in an overall net increase in stock price and thus a masking of the reduction in price caused by the negative disclosure. (SG Brief at 13). This hypothetical is of no matter to this case because here we do not have even an allegation of a post-disclosure price reduction masked by other positive information. Instead, respondents seek to recover losses for the February 25, 1998 decline in stock price, which, by their own admission, is not causally related to the much later disclosure of the alleged misrepresentations concerning Albuterol Spiros. Moreover, the Solicitor General's hypothetical still requires an allegation and proof that disclosure of the correct information is what reduced the price of the stock from what it "would otherwise have been." (SG Brief at 13). The Solicitor General clearly stated its position that the Ninth Circuit's decision here was incorrect and erroneous. Respondents' efforts to mischaracterize the position of the Solicitor General should be disregarded. Which party will benefit by the legal rule proposed by the Solicitor General is of no current import. The sole question here is whether this Court should grant certiorari, which the Solicitor General has urged it to do.

4. Respondents appear to posit that upon amending their complaint, they can assert claims based on the November 3, 1998 Albuterol Spiros announcement by Dura and subsequent

share price decline on behalf of the putative class. In fact, respondents cannot now attempt to expand their class to include purchasers of Dura stock beyond February 25, 1998 through the November 3, 1998 announcement. Such an expansion would be time-barred. *See In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935-36 (9th Cir. 1996) (extension of class period denied where time-barred and would not relate back because two groups would not have identity of interests and claimants bought stock at different values and after different disclosures and statements were made by defendants); *In re Commtouch Software Ltd. Sec. Litig.*, 2002 WL 3147998 (N.D. Cal. July 24, 2002) (following *Syntex* and rejecting attempt to expand class period where statute of limitations had lapsed). Consequently, respondents are in fact limited to attempting to fashion allegations on behalf of the previously defined putative class. Further, the leave to amend afforded respondents by the Ninth Circuit's Order on the issue of scienter does not empower them to assert claims concerning the November 3, 1998 announcement on behalf of even this class, *nor did respondents ever seek such relief.* (Pet. App. 15a-16a). Nowhere did the Ninth Circuit afford leave to amend with respect to the November 1998 share price decline or any other novel or previously unraised causation theories.

Moreover, petitioners are unaware of any authority supporting respondents' novel construction of a securities class action with an identified class period asserting a damages claim associated with a share price decline which occurred nine months after the conclusion of that class period. Such a construct is inconsistent with the basic principles courts consistently apply in securities class actions where it is the behavior of the share price or investment during or immediately at the end of the class period that is relevant to

demonstrate economic loss. *See, e.g., Robbins v. Kroger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997) ("Plaintiffs offered no evidence of a connection between Deloitte's misrepresentation and the decline in price of KPI stock throughout the class period or following the October 1990 dividend cut [at the end of the class period]."); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 185-86 (3d Cir. 2000) (holding that plaintiffs' actual economic loss had been sufficiently alleged where share price decline occurred at conclusion of class period).

Respondents' counsel are among the most sophisticated practitioners in this field among the plaintiffs' bar. They were aware of all of the Albuterol Spiros developments, the November 3, 1998 announcement and movements in Dura's share price up until February 1999 when they filed their first complaint. It is not accidental that they consciously elected to define their Class Period as ending on February 25, 1998 with its more substantial associated price decline. They had the opportunity to amend this Class Period and these very allegations as late as September 23, 2000, prior to the district court's dismissal of the action, and elected not to do so.

5. Respondents argue that because establishing loss causation can be factually complicated and "potentially messy," it is not something to be resolved as a matter of law at the pleading stage. (Resp. Supp. Brief at 6). As the cases discussed in the Petition and the supporting briefs make clear, the required element of loss causation is a rule of law that applies equally at both the pleading and proof stages – a proposition which respondents do not dispute. But this argument is inapplicable to this case. Respondents never alleged (in either simple or complicated fashion) any decline in share price (actual or masked) from the information about Albuterol Spiros announced on November 3, 1998.

This case presents the loss causation issue plainly and cleanly. The decline in value for which respondents seek to recover occurred on February 25, 1998, the day after the class period ended, when the price of Dura's stock dropped 47%. Respondents do not allege, however, that the 47% drop was caused by Dura's announcement regarding Albuterol Spiros, because it was not until nine months later in November 1998 that Dura and the public learned that the FDA did not approve Albuterol Spiros. The facts of this case are neither complex nor messy. Indeed, when the district court applied the proper standard for loss causation, it granted petitioner's Rule 12(b)(6) motion and dismissed respondents' complaint and its Albuterol Spiros-based allegations with prejudice.

This Court should grant the petition for *certiorari*.

Respectfully submitted,

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